SUPREME COURT, U. S.

No. 73-857

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM — 1973

MELVIN L. MEDANSKY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on October 3, 1973.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported and is printed in full as an Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on October 3, 1973. A timely Petition for Rehearing En Banc was filed by Petitioner on October 17, 1973. Such Petition for Rehearing En Banc was denied by the Court of Appeals on November 2, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does a district court's refusal to inquire of a jury and accept any verdicts on any counts in a multicount indictment violate a defendant's constitutional rights to trial by jury, due process and against double jeopardy?

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Fifth Amendment to the Constitution:

> "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . ."

Sixth Amendment to the Constitution:

> "the accused shall enjoy the right to a . . . trial, by an impartial jury . . ."

Rule 31(b) Federal Rules of Criminal Procedure:

> "Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again."

Rule 3.02 Local Criminal Rules for the United States District Court for the Northern District of Illinois:

> "3.02 Contact With Jurors. After the conclusion of a trial, no party, his agent or his attorney shall communicate or attempt to communicate with any members of the petit jury before which the case was tried without first receiving permission of the Court."

STATEMENT

Petitioner Melvin Medansky, an attorney, was indicted on eleven counts of mail fraud in violation of 18 U.S.C. §1341, in that he allegedly, in participation with Dr. William Becker, used the mails to defraud insurance companies by submitting fraudulent medical bills, reports and expenses. Dr. Becker, however, was not made a defendant and became the key prosecution witness. Other witnesses, namely insurance adjusters and petitioner's clients, were called in an effort to corroborate such testimony. The defense consisted of petitioner's good faith explanations of the subject payments and expenses as well as significant character witnesses.

Prior to the submission of the case to the jury on December 9, 1971, the trial judge instructed the jury, among other things, that the evidence must be evaluated independently and individually with respect to each of the eleven counts [App. 11];[1] that each count is a separate charge and like a separate case must be decided separately and to look at each of these counts individually and to render a verdict as to each of the eleven counts [App. 11, 12, 13]. He further instructed the jury that when they

[1] "App." refers to appendix filed in the appeal to the United States Court of Appeals for the Seventh Circuit, No. 72-1790.

arrived at their unanimous verdict with respect to the eleven counts, then they were to fill in the verdict forms that represented or reflected that verdict [App. 14].

On December 10, 1971, at approximately 11:00 a.m., after the jury had been deliberating for approximately 10 hours, the court acting on its own motion informed petitioner that the Foreman was of the opinion that the jury was in irrevocable disagreement and that if the jury would not arrive at a verdict by 12:30 p.m. he would declare a mistrial [App. 15]; that he would not accept verdicts as to any counts; and that unless the jury had reached a verdict as to all counts he was going to try the case all over again. [App. 15] The defense objected and wanted to accept jury verdicts on whatever counts the jury had agreed upon. The court refused stating that it was not prepared to accept "partial" verdicts—"that a jury which cannot arrive at verdicts on all counts in this case, we should just not treat them as having made any determinations and start the case over." [App. 16-20] The court recessed until 12:30 p.m.

At 12:30 p.m., the court reconvened and advised petitioner that the jury had informed the marshal that they were still in irrevocable disagreement. At this time the court stated that it was going to declare a mistrial [App. 21]. Counsel for petitioner objected and moved that the jury be given additional time to deliberate and if the court denied this request, that the court should inquire of the jurors on what count, if any, a verdict had been reached, and if so, what that verdict was [App. 22]. The court stated it would not accept partial verdicts or verdicts on some counts and asserted that the jury which decides the case should decide all the counts. [App. 22, 23] Counsel for petitioner advised the court that if it didn't so inquire

and declare a mistrial he would move for dismissal of the indictment on double jeopardy grounds [App. 23]. The court nevertheless refused to inquire whether or not the jury reached any verdicts on any counts [App. 23, 24]. Petitioner then moved, pursuant to Rule 3.02 of the Local Criminal Rules of the District, for permission to communicate with the jurors after their discharge to inquire of them if they had, in fact, reached a verdict as to any particular counts, and what that verdict was. [App. 24] The district judge not only denied this motion but advised counsel that he was going to specifically instruct the jury concerning this rule—that if any of them were contacted by anyone, they should advise the judge, and that the requirements of the court with respect to this rule must be strictly observed. [App. 25]

The jury was then brought into court and the judge stated "you are irrevocably in disagreement, is that correct?" to which the Foreman answered "Right." [App. 26] The court then declared the jury was in fact hung, discharged the jury and declared a mistrial explaining to the jury that "it simply means that no verdicts will be received in this case, . . ." [App. 27]. Counsel for defendant then moved for dismissal of the indictment on the grounds of double jeopardy which the court denied and the case was set for retrial before another jury. [App. 28, 29, 30]

At no time did the Government object to the court's procedure in refusing to inquire or accept verdicts on any count nor did the Government object to the declaration of a mistrial. There is nothing in the record to indicate whether any of the verdict forms had been filled in.

A Petition for a Writ of Mandamus [72-1025] was filed with the United States Court of Appeals for the Seventh

Circuit seeking to prohibit petitioner's reprosecution or in the alternative for a hearing to ascertain from the jurors if any verdicts were reached on any of the eleven counts of the indictment. On January 13, 1972, the Seventh Circuit denied such petition without opinion. A Motion for Leave to File a Petition for Writ of Mandamus was subsequently filed with this Court [71-968] but such motion was denied. Mr. Justice Douglas was of the opinion that the motion should have been granted.

Subsequently, on February 23, 1972, petitioner filed in the district court a written motion to dismiss the indictment on the grounds of double jeopardy and denial of right to trial by jury. [R. 64] On April 11, 1972, after the jury was selected and sworn for the second trial, counsel again moved for dismissal on the same grounds; the court again denied the motion. [App. 31, 32] At the second trial, Medansky was acquitted on one count and found guilty on ten counts. He was subsequently sentenced to imprisonment for eighteen months on each count to run concurrently but fined consecutively $500.00 on each count for a total of $5,000.00.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for a writ of certiorari for two fundamental reasons; (1) the Seventh Circuit has clearly failed to adhere to this Court's directives set forth in *Downum* v. *United States,* 372 U.S. 734, (1963), *United States* v. *Jorn,* 400 U.S. 470 (1971) and *Illinois* v. *Somerville,* 410 U.S. 458 (1973), requiring trial judges not to eagerly abort trials but rather to further investigate, seek out and consider all avenues of cure to avoid a mistrial; and (2) there now exists a clear discrepancy in the Circuit Courts of Appeal as to the scope of a trial judge's discretion under the "manifest necessity" test which is to be applied in the determination of whether a defendant's right not to be twice put in jeopardy has been infringed.

In affirming Medansky's conviction the Seventh Circuit concluded that there was no infringement of appellant's constitutional rights to trial by jury or against double jeopardy. The Court of Appeals premised this judgment on the following determinations:

(1) The trial judge validly exercised his discretion under the manifest necessity test in dismissing the deliberating jury without inquiring whether any verdicts on individual counts were determined. (Op. 6-7, 10)[2]

(2) The record did not disclose that any partial verdicts were in fact returned by the jury. (Op. 4-5, 8-11)

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[2] Citation is to the Opinion of the United States Court of Appeals for the Seventh Circuit filed as an appendix herein.

(3) No good purpose would have been served even if the court inquired of the jury and received an affirmative response that verdicts were reached on certain counts since such would be but "tentative verdicts." (Op. 12)

An analysis of the pertinent facts and law in light of the foregoing conclusions reveals that the Seventh Circuit has misinterpreted this Court's precedents and set forth a questionable rule for the district courts.

Of utmost importance herein is the practical effect of the appellate court's opinion is to significantly reduce a jury's decision making process to one of rendering verdicts on either all counts of multicount indictment or none at all. In failing to require a district judge to inquire of the jury prior to its dismissal whether it reached any verdicts on any individual counts, a serious question arises whether such procedure disregards a defendant's fundamental right to obtain any verdicts that that particular tribunal may have reached. Under existing precedents the manifest necessity test has been applied only to instances where a pending trial is aborted because of impairments prior to deliberation or where a jury is clearly unable to reach any verdict at all. The manifest necessity test has never been applied to justify a district judge's failure to inquire of the jury and receive any verdict that the jury may have determined on any count.

In addition, the Seventh Circuit's unique holding that verdicts on some counts, but less than all, merely constitute a "tentative verdict" which the judge need not accept, raises other serious unanswered difficulties. This rationale, which vests a district judge with such discretion, may lend itself to the possibility of manipulation as well as provide the prosecution with an opportunity to strengthen its case and reprosecute on the very counts which a jury has reached a decision in favor of the defen-

dant. Thus, the instant petition provides this Court with an opportunity to clarify what discretionary authority a district judge possesses, if any at all, with respect to dismissing a deliberating jury in a multicount prosecution without inquiring as to whether verdicts on individual counts have been reached. Or stated differently, must a district court, prior to dismissing a jury as being hung, inquire whether that jury has reached a verdict on any individual count?

A careful reading of the decisions in *Downum* v. *United States*, 372 U.S. 734 (1963) and *United States* v. *Jorn*, 400 U.S. 470 (1971) reveals this Court's clear direction to trial judges not to eagerly abort trials but rather to further investigate and seek out and consider all possible avenues of cure to avoid a mistrial. Such a direction is founded on the basic premise that the Fifth Amendment's prohibition against double jeopardy exists as a protection not necessarily against twice being punished, but rather against twice being put in jeopardy. *Downum* v. *United States*, 372 U.S. 734 (1963); *Patton* v. *North Carolina*, 381 F. 2d 636, 643 (4th Cir. 1967). "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshall the resources and energies necessary to his defense more than once for the same alleged criminal acts." *Abbate* v. *United States*, 359 U.S. 187, 199 (1959). In addition, *Downum* directs that considering the importance of the right in question, courts must "*resolve any doubt in favor of the liberty of the citizen*, rather than exercise what would be unlimited, *uncertain*, and arbitrary judicial discretion." 372 U.S. at 738. In each instance the Court put upon the trial judge a duty to exhaust all other reasonable possibilities before deciding to abort a trial.

While the Seventh Circuit expressed formal acknowledgment of the Supreme Court's directives, it, nevertheless, premised its affirmance on the clearly "uncertain" determination that the record did not reveal that any verdicts on any counts had in fact been reached. Under the circumstances of this case such a conclusion is at least an equivalent exercise in speculation as the contrary resolution. Cf., *Street* v. *New York,* 394 U.S. 576, 585-86 (1969). In support of its conclusion the court primarily relies on the fact that (1) though the jury had the verdict forms in its possession, there is no indication that any was completed in any manner, and (2) the Foreman acknowledged that the jury was in irrevocable disagreement. (Op. 9-11) Under the instant facts neither can support the court's determination.

The jurors were repeatedly instructed that each count was a separate charge and "like a separate case" [App. 11]; the evidence should be weighed "independently as to each count" [App. 12]; "each of these counts is an individual case" [App. 13]; this is the same as if there were eleven distinct cases [App. 13]; and again "look at these counts individually" [App. 14]. After such specific instructions relating to the individuality of each count and immediately after the trial judge explained the three forms of verdict, the jurors were pointedly instructed *not* to fill in any verdict form until it reached a unanimous verdict on *all* counts:

> "When you have arrived at your unanimous verdict, and I want to repeat you are going to have to look at each of these counts individually, *when you have arrived at your unanimous verdict with respect to the eleven counts, you will fill in the verdict form which represents or reflects that verdict,* rap on the jury room door, the marshal who will be responsible for your deliberations will receive the verdict form, advise us. Or, he doesn't receive the verdict form. He

will just tell us and we receive the verdict in open court." (App. 14)

In addition, in view of these instructions it is hardly adequate to state that the jury was "hung" merely because the Foreman affirmed the trial judge's statement that they were in irrevocable disagreement. Here, where the district court specifically refused to inquire if they had agreed on any count, such a response to a general inquiry could obviously be interpreted to apply to any count or counts—one, five, ten or all—upon which the jury had not yet agreed. Such an interpretation is readily apparent from the trial judge's own comments in dismissing the jury—declaring a mistrial "simply means that *no verdicts will be received in the case.*" (App. 27) To conclude otherwise is to enter that "uncertain" area—an area wherein this Court has directed resolution in favor of a citizen's liberty.

Furthermore, the Seventh Circuit has attempted to justify its position by asserting that the foreman would have volunteered any individual verdicts (Op. 10-11). This rationale, however, would place a duty to volunteer on a layman juror as opposed to a duty to inquire by the district judge, a conclusion seemingly contrary to the basic functions of a judge and the jury.

In addition, it is clear from the record that despite defense counsel's repeated suggestions, the court at no time even *wanted* to determine if any verdicts had been received,

> "let us suppose that they have arrived at verdicts of guilty on some counts and not guilty on some counts and can't agree on others. I think you ought to start over. *I don't want to find out what their position is because I don't want to make the decision as to whether or not to start over on all counts,* depending whether they have found verdicts of one kind and verdicts of another kind on some of the counts." (App. 16) (Emphasis added)

The court had no intention of taking a verdict on less than all counts, stated so, and specifically avoided such inquiry by restricting his questioning of the Foreman through his categorical declaration "you are irrevocably in disagreement, is that correct?" (App.-26)

Furthermore, the defense did not passively await the jury's dismissal and the court's entry of a mistrial and then seek the benefit of the court's error. On the contrary, the petitioner took the initiative by (1) objecting to the jury's dismissal, (2) suggesting the court give a modified Allen charge; (3) requesting repeatedly that the court inquire as to whether any verdicts on any counts were reached, (4) acknowledging that he would be bound by such verdicts, if any were returned, (5) noting specifically to the court his intention to move for a dismissal of the indictment on double jeopardy grounds if the court refused to inquire as to any verdicts on any counts, and (6) requesting the court's permission under Rule 3.02 of the Criminal Rules of the District to interview the jurors to determine if they had reached any verdicts. [App. 15-20] Petitioner to say the least put his freedom on the line and exhausted all known avenues in his effort to discover whether any verdicts on any counts had in fact been reached by the deliberating jury. Despite such repeated encouragement, the district court denied each such request—each of which could have been resolved by a simple jury inquiry.

The Seventh Circuit totally discounted such initiative by the defense and concluded that "no good purpose would have been served even if the court had inquired and received an affirmative answer" since such answers would be but "tentative verdicts" (Op. 12) This unique "tentative verdict" rationale will undoubtedly severely restrict, if not completely eliminate, the return of partial verdicts in multicount criminal cases. Such a determination is clearly contrary to this Court's directives in *Jorn*

and *Downum* as well as *Selvester* v. *United States*, 170 U.S. 262 (1898), which protects each party's right to any verdict on any count reached by a jury.[3]

If, in fact, the jury had reported that it was unable to agree on *any* count, petitioner would certainly agree that the district judge's declaration of a hung jury was proper under the manifest necessity test. But such a test cannot be applied as a filter for individual counts. If the jury had reported that they did reach a verdict on certain counts, such verdicts must be received even though the manifest necessity test may well have justified a hung jury on the remaining counts. This was acknowledged by the Solicitor General in his opposition to defendant's motion for leave to file a Petition for a Writ of Mandamus in the United States Supreme Court [71-968].

Considering the district court's specific instructions not to return a verdict on any count until a unanimous verdict was reached on all counts, the only way a verdict on some, but not all, counts could ever have been received *without judicial inquiry* was if the jury disregarded the court's instructions. If a judge cannot refuse to accept a jury's verdict on less than all counts, how may he determine if any such verdicts have been returned without inquiring? A defendant has a right to any verdict reached by the jury. A trial court's specific refusal to inquire if any verdicts

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[3] Cf., *Benton* v. *Maryland*, 395 U.S. 784 (1969), wherein this Court held that the double jeopardy clause protects a defendant against a retrial on a count of an indictment on which he was acquitted after he successfully appealed his conviction on another count of the indictment. See also, Rule 31 (b) Federal Rules of Criminal Procedure, which specifically provides for a verdict or verdicts to be returned as to one defendant at any time during deliberations even though no verdict has yet been reached on other defendants.

were returned prior to declaring a hung jury is the practical equivalent of refusing to receive a partial verdict volunteered by such jury. Our constitutional rights cannot hinge on such "discretionary" distinctions.

Contrary to the Seventh Circuit, other courts of appeal have interpreted this Court's holdings in *Downum, Jorn* and *Illinois* v. *Somerville,* 410 U.S. 458, (1973), as considerably narrowing a trial judge's discretion to abort a trial. In *United States* v. *Walden,* 448 F. 2d 925 (4th Cir. 1971), the Fourth Circuit considered the issue of double jeopardy wherein the district judge aborted the first trial on his own motion after two jurors observed one or more defendants in handcuffs at a recess. In reversing the defendants' convictions because of double jeopardy the appellate court specifically noted that: the defense sought to clarify what occurred and offered alternative curative measures (at 926); the defense candidly advised the court of its motion to dismiss on grounds of double jeopardy (at 927); there was no clarification as to the belief and impact on the jury (at 929); there was at least an equal possibility that the jurors may have or may have not understood the event (at 929). Though each of these significant factors was present in Petitioner's trial, the Seventh Circuit chose to disregard them and affirm.

The Third Circuit held that a trial judge's sua sponte dismissal of a deliberating jury on his belief of their weariness violated this Court's standards and, thus, any retrial was barred by the double jeopardy clause. *United States ex rel Russo* v. *Superior Court,* 483 F. 2d 7 (3d Cir. 1973). Not only did the Third Circuit emphasize the defendant's valued right "to have his trial completed by a particular tribunal,"[4] but it also asserted its concern that the

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[4] 438 F. 2d at 12. *Green* v. *United States,* 355 U.S. 184 (1957).

jurors were never consulted as well as expressing its fear of the possibility of manipulation inherent in such a procedure should it not narrowly construe the "manifest necessity" discretion of a trial judge.

The Fifth Circuit has likewise chosen to restrict a district court's discretion to abort a trial under the manifest necessity test. *United States* v. *Cheung,* 14 CrL 2160 (5th Cir. October 31, 1973). The Fifth Circuit premised its decision on two considerations: (1) the trial judge failed to consider alternatives to declaring a mistrial when certain difficulties arose in translating a witness' testimony from Chinese; and (2) the prosecution was given an opportunity to strengthen its case. This latter argument, though highly applicable, was never considered by the Seventh Circuit in Petitioner's appeal.[5]

A review of the foregoing citations shows an obvious conflict of interpretation between the Third, Fourth and Fifth Circuits and the Seventh Circuit's rationale in the instant petition. Contrary to these other courts of appeals, the Seventh Circuit would clothe a district judge with broad discretion to abort a trial in allowing the district court to dismiss a deliberating jury without inquiry as to whether they have reached any verdict on any count.

Petitioner Medansky herein requests a writ of certiorari so this Court may reassert the principles of *Downum, Jorn*

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[5] At Medansky's first trial the prosecution's principal witness was unable to identify the defendant. Needless to say this prosecutorial difficulty was not apparent at the second trial. In addition, the prosecution did not call certain witnesses at the second trial who were successfully impeached at the first proceeding. Furthermore, the witnesses who did testify at both trials were unquestionably better prepared at the second.

and *Somerville* and furnish the district courts with guidelines to be followed in the exercise of discretion under the manifest necessity test.

Respectfully submitted;

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 — APRIL SESSION, 1973

No. 72-1790

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MELVIN L. MEDANSKY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71-CR-79
HUBERT L. WILL, *Judge.*

ARGUED JUNE 15, 1973 — DECIDED OCTOBER 3, 1973

Before KILEY, PELL and STEVENS, *Circuit Judges.*

KILEY, *Circuit Judge.* Melvin L. Medansky, an attorney, appeals from his conviction by a jury on ten counts of an eleven count indictment charging him, and Dr. William Becker, with devising and carrying out a scheme to defraud Medansky's clients and insurance companies in violation of 18 U.S.C. §1341.[1] We affirm the conviction.

[1] "Frauds and swindles."

Each of the counts charged a separate instance of a specific mailing in the operation of the scheme. The indictment charged the following: Medansky agreed to refer accident victims to Dr. Becker who in turn would prepare false medical bills which both Becker and Medansky knew were false. Becker would then mail the bills to Medansky who then mailed them to the insurance companies. Upon obtaining a settlement of his clients' insurance claims, Medansky would deduct the full amount of the fraudulent medical bills from the settlement and then divide the excess payment with Becker.

The appeal before us is from the judgment in the second trial of the indictment. The first trial began on November 24, 1971. After presentation of the evidence by both sides, the case went to the jury, with the instruction that each count of the indictment should be treated independently. The jury was given three forms of verdict, one for conviction on all counts, another for acquittal on all counts, and a third for whatever verdicts the jury might find necessary among the several counts. The jury failed to reach a verdict, it so informed the court, and subsequently the court, over the objection of Medansky, declared a mistrial as a result of a hung jury. After the ruling Medansky moved for dismissal of the indictment on the ground of double jeopardy. The motion was denied, and the case was reset for the trial subject of this appeal.[2]

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[2] In the interim, on January 10, 1972, Medansky filed a petition for a writ of mandamus in this court (No. 71-1025) seeking in the alternative an order that the district court dismiss the indictment, an order that the district court conduct a hearing to allow the defense to interrogate jurors in order to discover whether verdicts had been reached on any counts in the indictment, and an order staying the second trial until full hearing on the mandamus petition in this court. This court denied the mandamus petition without calling for response, and subsequently the Supreme Court denied leave to appellant to file a petition for mandamus.

The second trial commenced on April 11, 1972, with the selection of the jury. Medansky renewed his motion to dismiss the indictment, on the double jeopardy ground. The motion was denied. Becker was called as the government's first witness. He testified that he had been a practicing physician since 1945, that in June, 1970, he was convicted of mail fraud for mailing false medical bills to an attorney other than Medansky, and that in return for probation agreed to testify truthfully in any future proceedings involving mail fraud of which he had knowledge.

Becker testified that he first met Medansky in late 1964 or early 1965, while Becker was working for another personal injury lawyer who was assisted by Medansky in a scheme similar to the one before us. According to Becker, Medansky asked Becker to join him in the alleged fraudulent scheme subject of the indictment, and both "understood" the fraudulent nature of the enterprise they were establishing.

Becker testified that during the operation of the alleged scheme, and until late 1968 or early 1969, Medansky referred 30 to 40 "patients" to him, and Becker prepared, with respect to each, and submitted to Medansky, an inflated bill, and that within six or eight months of Becker's submission of each bill Medansky would remit to him "40 to 60% of the face amount of the bill." Becker's testimony as to the method of referral, the date of the injury, the services actually performed, the services billed, and the amount he ultimately received, covered each of the eleven counts.

The testimony with respect to the ten counts of the indictment before us included descriptions of the accidents, the victims' contacts with Medansky, and their referral to Becker. The accident victims then described

their contacts with and actual treatment by Becker. The insurance company representatives testified as to the total amounts of the settlements. Three of the insurance company representatives testified that their companies used mathematical formulas by which a multiplier was applied to the expenses submitted to determine the final payment due.

The cross-examination of Becker during three days extends over nearly 300 pages of the transcript. The aim of Medansky's attorney was to impeach Becker by showing his guilty plea to an indictment originally containing 17 counts, his "deal" with the government to testify against Medansky, contradictions between his testimony at the first and second trials, and his false medical bills sent to Medansky. The cross-examination adduced ample evidence for Medansky's purpose to enable the jury to measure Becker's credibility.

I.

THE CONSTITUTIONAL QUESTIONS

A. Medansky contends that the district court denied him his Sixth Amendment right to trial by jury in refusing to accept verdicts, if any, from the first jury on some counts of the indictment, and by refusing to inquire whether the jury had reached verdicts on any of the counts. He relies on *Ex parte United States*, 287 U.S. 241 (1932), for the proposition that the district court had no power to decline to accept partial jury verdicts. There the district court, relying on its discretion, refused to issue a bench warrant based on a proper grand jury indictment. The Court held that it was for the grand jury to determine probable cause and that the district court did not have the power to refuse to "enforce" the indictment. That decision is inapposite. The same is true of *United States*

v. *Thompson*, 251 U.S. 407 (1920), and *Ex parte United States*, 242 U.S. 27 (1916).

We cannot say there was denial of Medansky's right to trial by jury in the court's refusal to make "an in-depth interrogation of each juror" to determine whether the jury had reached "possible verdicts" on any of the counts in "this case which charges an over-all scheme . . . to defraud." In *United States* v. *Skidmore*, 123 F.2d 604, 612 (7th Cir. 1941), this court approved a district judge's receipt of a guilty verdict in one of two consolidated cases and his inquiry of jury prospects of agreement upon the other indictment. The holding of this court there did not compel the judge here either to inquire about the jury's disposition on the various counts where there was no indication that agreement had been reached on any, or to permit Medansky's attorney to inquire whether the jury had reached verdicts on any counts. And no one can fairly infer from the colloquy with the foreman that some verdicts were reached. Neither does the second Circuit's decision in *United States* v. *Cotter*, 60 F.2d 689 (2nd Cir. 1932), or *United States* v. *Frankel*, 65 F.2d 285 (2nd Cir. 1933), compel that result here.

Even if we assume, arguendo, that the district court was compelled to accept partial verdicts, the record here does not warrant the premise that the jury had reached verdicts on some of the counts of the indictment. The record precludes application of *Selvester* v. *United States*, 170 U.S. 262 (1898), and *Dunn* v. *United States*, 284 U.S. 390 (1932). In fact, the last two sentences in the following quotation from *Selvester* at 269 support the contrary of Medansky's contention:

> Doubtless, where a jury, although convicting as to some, are silent as to other counts in an indictment and are discharged . . . the effect . . . is "equivalent

> to acquittal." . . . But such obviously is not the case, where . . . a disagreement is formally entered on the record. The effect of such entry justifies the discharge of the jury, and therefore a subsequent prosecution . . . [and] would not constitute second jeopardy.

Based on our analysis of the facts, we perceive no substance to Medansky's argument that the district court denied his Sixth Amendment right to trial by jury.

B. We think that the vital issue before us is whether Medansky's Fifth Amendment protection against being twice placed in jeopardy was violated by his second trial. He contends that the district court was under logical and legal compulsion to inquire whether the jury in the first trial reached a verdict on some counts of the indictment. No decision cited nor found has announced that rule, and our conclusion above in Section A weakens Medansky's contention on this vital issue.[3]

The touchstone for constitutional evaluation of the mandate of the double jeopardy clause of the Fifth Amendment is *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), involving discharge of a jury "unable to agree." There Justice Story stated the rule that "the law has invested courts . . . with the authority to discharge a jury from giving any verdict, whenever . . . [under] all the circumstances . . . there is a manifest necessity . . . or the ends of public justice would otherwise be defeated." He does not speak in terms of a duty incumbent on the court, but characterizes the court's responsibility as an "exercise [of] sound discretion" and a "power [which]

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[3] In *United States* v. *Conti*, 361 F.2d 153, 159 (2nd Cir. 1966), the court held that the district court had not prejudiced the defendant by asking a jury, which was still deliberating and had not indicated it was in disagreement, which counts it was in agreement on, especially where all counsel acquiesced in that inquiry.

ought to be used with the greatest caution." The issue therefore is not whether the district judge violated a duty in declaring a mistrial, but whether the court abused its discretion in exercising that power.

The *Perez* rule was substantially restated in the most recent opinion of the Supreme Court dealing with double jeopardy, *Illinois* v. *Somerville*, 410 U.S. 458, 462 (1973), where the Court said, after reliance upon *Perez:*

> This formulation, consistently adhered to by this Court in subsequent decisions, abjures the application of any mechanical formula . . . . The broad discretion reserved to the trial judge in such circumstances has been consistently reiterated in decisions of this Court.
>
> • • •
>
> Similarly, in *Gori* v. *United States*, 367 U.S. 364 (1961), the Court again underscored the breadth of a trial judge's discretion, and the reasons therefor, to declare a mistrial.
>
> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared . . . even over his [defendant's] objection, and he may be retried consistently with the Fifth Amendment." *Id.*, at 368.

The Court in *Somerville*, at 467, stated "the conclusion that jeopardy had attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial."[4] Having once determined that jeopardy has at-

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[4] This statement was after commenting on the many exceptions to the fundamental rule "that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again." *Green* v. *United States*, 355 U.S. 184, 188 (1957), citing *Wade* v. *Hunter*, 366 U.S. 684; *Kepner* v. *United States*, 195 U.S. 100, 128 (1904).

tached, the court then looks to see if "manifest necessity . . . or the ends of public justice" require abrogation of the rule. *See United States* v. *Perez, supra.*

Some of the circumstances that qualify as exceptions to the general rule are: disqualification of a juror, death or other incapacity of the trial judge and probably of counsel, and the tactical needs of the military in time of war.[5] "The classic example is a mistrial because the jury is unable to agree. *United States* v. *Perez, supra; Logan* v. *United States,* 144 U.S. 263, 298; *Dreyer* v. *Illinois,* 187 U.S. 71, 85-86; *Keerl* v. *Montana,* 213 U.S. 135." *Downum* v. *United States,* 372 U.S. 734, 736 (1963). Even this classic exception, however, is not to be "mechanically" applied. We rather look to the facts and circumstances surrounding the discharge "resolv[ing] any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.' " *Downum* at 738, citing *United States* v. *Watson,* 28 F. Cas. 499, 500-501.

With these rules in mind, we turn to the question whether the district court under the particular circumstances could properly exercise its discretion by declaring a mistrial as required by manifest necessity or public justice.

Before the jury retired, at the first trial, the district court gave three forms of verdict: one form for the jury to find guilt on all counts, another finding not guilty as to all counts, and a third form for the jury to find the defendant guilty or not guilty on one or more counts less than

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[5] Note, 77 Harv. L. Rev. 1272, 1277 (1964), citing *Thompson* v. *United States,* 155 U.S. 271 (1894); *Simmons* v. *United States,* 142 U.S. 148 (1891); *Wade* v. *Hunter,* 336 U.S. 684, 688-89 (1949); and others.

all. In the third form the jury could record its vote separately as to each count.

The jury retired for deliberation the morning of December 9, 1971. At 10:00 p.m. that night it had not reached a verdict. At 8:30 a.m. on December 10 the jury resumed deliberation. Some time before 11:00 a.m., the jury foreman reported to the marshal that the jury was in "irrevocable" disagreement, had been all along, and that "if it took two weeks they wouldn't arrive at a verdict." Over objections of Medansky's counsel the court determined that it would recall the jury at 12:30 p.m. and if no verdict was reached the court would declare a mistrial.

When the jury was recalled at 12:30 p.m. the following dialogue took place:

> THE COURT: Good morning, ladies and gentlemen of the jury. Mr. Calligaris, I infer from your occupying the first seat, that you were elected the foreman of the jury. That is good circumstantial evidence.
>
> The marshal has advised me that the jury, through you, or otherwise, have informed him that you are irrevocably in disagreement, is that correct?
>
> THE FOREMAN: Right, sir.
>
> THE COURT: He tells me, as a matter of fact, there has been no change in the position of the members of the jury since last evening with respect to verdicts in this case.
>
> THE FOREMAN: That is correct.
>
> THE COURT: I think under those circumstances then, that there will be no further purpose served in your deliberating further. Do you agree with that?
>
> THE FOREMAN: Wholeheartedly.
>
> THE COURT: Under these circumstances, I am going to declare that you are in fact hung, if you tell me you are.

THE FOREMAN: Yes, sir, we are hung.
THE COURT: You are hung?
THE FOREMAN: We are hung.

In our view of the record there is no reasonable doubt that the district court could properly determine that there was a manifest necessity for declaring a mistrial and that public justice did not require that the trial continue. The circumstances surrounding the court's ruling we think clearly met the *Perez-Somerville* test. The jury was informed by the three forms of verdict that they could find Medansky guilty, or not guilty as charged, or guilty or not guilty as to each of the separate counts; and the forms were a constant reminder in the jury room throughout deliberation. The jury deliberated throughout December 9 until 10:00 p.m. and the next day from 8:30 a.m. to 11 a.m. when it told the court, through the marshal, that it was in irrevocable disagreement. The court decided to prolong the deliberation for another hour and a half. Upon recall the colloquy between the jury foreman and the court we think justified the court in concluding that it was clear that requiring further deliberation would be imprudent, of no possible benefit to Medansky or the government, and a waste of time of jurors, court and attorneys and a needless expense.

The record does not disclose whether the forms of verdict were returned to the courtroom. We know that verdicts were not reached with respect to the general forms. We cannot assume that any one of the forms was signed in any way. And the district court did not err in refusing to inquire whether the jury had reached a tentative verdict on the third form with respect to any of the counts. What decisions or concessions are made by jurors on any count of an indictment are not binding until a verdict is signed and returned in open court. Moreover, a normal

response to the questions asked by the district court would have led the foreman to reveal a final verdict on some of the counts if his fellow jurors had agreed to and recorded a verdict on any count. We hold the district court under these circumstances did not abuse its discretion in declaring the mistrial in the first trial.

We are not persuaded by Medansky's argument that a mistrial was not necessary because the trial court had available alternatives that would have avoided the mistrial. His suggestion that the district court give a "modified" *Allen* charge, *Allen* v. *United States*, 164 U.S. 492, 501-02 (1896), was rejected by the Court which stated "it may very well have a coercive effect". Another alternative Medansky suggested was that he be allowed to question the jury about the possibility that any verdicts might have been reached. At the time of Medansky's first trial the appropriateness of the use of a modified *Allen* charge was highly controversial. The decision not to give such a supplemental instruction was within the discretion of the trial judge. *See United States* v. *Brown*, 411 F.2d 930 (7th Cir. 1969).[6] We have already found no error in the district court's refusal to probe into the state of mind with respect to tentative verdicts, where as here no formal ver-

[6] In *Brown* the appellant argued that to give an *Allen* charge rather than to declare a jury hung deprived him of a mistrial which would have safeguarded his liberty. The decision focused on the questions of when an *Allen* charge was permissible and what form it ought to take. An assumption underlying the decision was that the instruction should not be given automatically whenever a jury seemed to be deadlocked, but only after the trial court, in its discretion, determined the instruction would help the jury reach a verdict. This court's recent decision in *United States* v. *Silvern*, No. 72-1133 (August 7, 1973), does not require the use of the modified *Allen* charge approved there.

dicts are returned. No good purpose would have been served even if the court had inquired and received an affirmative answer. The court could not order the tentative verdict made formal. We think the district court was well within its right to reject Medansky's suggestion. The inquiry requested was pregnant with danger to the free deliberation so essential to the proper functioning of the jury.

II.

CONTENTIONS AS TO CLAIMS OF ERROR AT TRIAL

In addition to the constitutional arguments raised, Medansky asserts five other grounds for reversal of his conviction at the second trial.

We see no merit in his challenge to the admission of testimony as to the ultimate disposition by Medansky of the proceeds obtained in the settlement of each claim subject to a count now before us. We see no prejudice to Medansky in the court's permitting employees of the victim insurance companies to testify relating to the formula used by the companies to reach a settlement in personal injury cases and the anticipated use of these funds. The testimony was merely to show the company's settlement procedures.

Medansky's contention that that testimony wrongfully accused him of cheating his clients is sufficiently refuted by the words of the indictment itself. It provides: "Melvin L. Medansky . . . and William Becker . . . devised . . . a scheme and artifice to defraud and to obtain money . . . from insurance firms . . . and from persons who were clients of said defendant. . . ." If the direct examination by the government had the effect of accusing Medansky

of cheating his clients, as he argues, that effect was clearly within the purview of the indictment. Furthermore Medansky testified on direct examination that his fee was one-third of each settlement.

The district court, upon introduction by the government of a portion of a State Farm Insurance Company file relevant to Count IV of the indictment, admitted a memorandum from an adjuster's supervisor to an adjuster, to "work something out" to reduce the damages. The document further contains the following opinion of the supervisor: "I think . . . this attorney seems to be trying to build it [the accident] all out of proportion by keeping the man out of work for three weeks." Medansky claims prejudice because the opinion expressed in the memorandum was offered to prove the truth of a portion of the indictment, and invaded the right of the jury to decide an ultimate issue arising from the charge in the indictment that it was a part of the scheme that Medansky and Becker "would and did cause clients of Melvin L. Medansky to absent themselves from employment to increase their alleged damages."

The record does not support Medansky's argument that the evidence was offered to prove the truth of the matter asserted. The document admitted into evidence by the court was introduced to prove the communication of information within the insurance company and not to prove the truth of paragraph ten of the indictment. The evidence was introduced to prove a relevant material fact, *i.e.*, the determination by the company to pay the claim. *United States* v. *Wyatt*, 437 F.2d 1168, 1170 (7th Cir. 1971), is totally inapposite. There the police report admitted was "[t]he only direct evidence offered to prove the automobile in question was . . . stolen . . . ."

Medansky also claims that under 28 U.S.C. §1732 the admission of the memorandum was error. The evidence established the memorandum was a writing made in the regular course of the insurance business, which carried with it sufficient truthworthiness to justify admissibility.[7]

We disagree with Medansky that the trial court exceeded the bounds of impartiality by excessive participation in the interrogation of witnesses and by interjecting comments "in a tone [of voice] which left no doubt . . . that the Court . . . disbelieved the defendant . . . ." Medansky relies primarily on *United States* v. *Carmel,* 267 F.2d 345, 350 (7th Cir. 1959), and *United States* v. *Dellinger,* 472 F.2d 340, 386-87 (7th Cir. 1972). He argues that the "cumulative effect" of the trial judge's "questions . . . comments, remarks and statements" taken as a whole are so highly prejudicial that we must reverse.

We have read the record to determine if the trial judge's actions were in performance of his duty to oversee the presentation of evidence and generally supervise the proper conduct of the trial, or whether his actions overstepped the bound of propriety. The record shows that the conduct of the trial judge here was not "deprecatory" or "antagonistic," nor was the challenged type of conduct "evident in the record from the very beginning." *United States* v. *Dellinger,* 472 F.2d 344, 386 (7th Cir. 1972). Moreover, this was not a "close case" at the second trial, as were *United States* v. *Hill,* 332 F.2d 105 (7th Cir. 1964), and *United States* v. *Carmel,* 269 F.2d 345 (7th Cir. 1959).

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[7] Although not yet effective, Proposed Rule of Evidence 803(6) would allow the admission of a document similar to the one at issue here. Moore's Federal Practice, Proposed Rules of Evidence 122 (Temp. Pamph. 1973); *see* Advisory Committee's Note, *id.* at 129-32.

The judge questioned Dr. Becker with respect to injuries of certain clients of Medansky, who had been X-rayed by a Dr. Gerber. He was clearly attempting to resolve ambiguity in Dr. Gerber's conclusion that: "No. 1, prominent transverse process of C-7, simulating cervical ribs. No. 2, no recent fractures are demonstrated in the cervical areas, but soft tissue injury should be considered." The meaning of the conclusion, as well as Dr. Becker's testimony with respect thereto, was clearly ambiguous and remained so even after questions by the government. We think the court acted in the best interests of the jury, Medansky, and the government, as well as the court, and properly intended to clarify the issue. *United States* v. *Nowak*, 448 F.2d 134, 140 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972).[8] And there is no merit in the claim that the "judge undertook to contradict Mr. Medansky's testimony [contrary to Becker's] point by point . . . ." Absent a recording of the trial, we are unable to appraise the alleged prejudicial "tone" of voice used by the trial court.

We find no reversible error in the claimed "highly prejudicial, improper government argument to [the] jury . . . ." Three grounds are stated: (1) the prosecutor argued that if the jury chose to believe appellant they must disbelieve all other witnesses; (2) he said that in effect the jury as insured persons had been defrauded by appellant; and (3) he referred to accident photographs that appellant claimed to have and said: "I will bet you ten to one . . . there were not any."

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[8] A similar incident occurred after Becker testified that an X-ray found: "Reduction of physiologic cervical lordosis consistent with posture of spasm. No evidence of traumatic bony pathology or dislocation. Normal findings in the lumbosacral and sacroiliac regions."

Medansky contends that the prosecutor's "all or nothing" argument improperly "shifted the burden of proof to the defendant." In *United States* v. *Dichiarinte*, 385 F.2d 333, 340 (7th Cir. 1967), this court said a similar argument ought to be balanced by an instruction reminding the jury that it was free to consider the theory of innocence offered by the defense. While here the district court did not expressly tell the jury it was free to consider Medansky's theory of innocence, the instructions are implicit with that idea. And there is no basis for criticism of the instruction that the jury must accept either the evidence favorable to the government or that favorable to Medansky. This did not invade the jury's freedom to consider Medansky's theory of innocence, *i.e.*, that Becker lied. The theory of innocence here was based on the argument that Becker was not worthy of belief even under oath, that his testimony was "incredible," that he lied on the stand, and that the other "clients" who testified were "pawns" of Becker or testifying inconsistently with reality because of the "terrifying" fear of the government they felt upon entering the United States Courthouse. We think Medansky essentially asked the jury to accept the "all or nothing" view. In any event, the court's instructions adequately complied with our admonition in *Dichiarinte*.

The prosecutor did not say that Medansky was "in effect" defrauding the jury. He said: "Mr. Medansky not only now was cheating everybody who has to pay for automobile insurance, . . . the companies, . . . [and] his clients. . . . Now he was cheating . . . Dr. Becker." There was ample evidence that exaggerated claims ultimately resulted in higher insurance rates, and the reference to Becker was an attempt to characterize him as comparatively less culpable than Medansky.

Finally, with respect to the photographs, Medansky offered to produce them as evidence at trial but the court refused to admit them because the government had failed to prove a part of the indictment which charged that Medansky submitted false property damage bills. Instead the court offered to strike that portion of the indictment, finding "no probative relationship between the picture of a bent-up automobile and . . . injuries of the passenger." After the prosecutor referred to the absence of photographs in closing argument, the court offered Medansky the opportunity to use them in his closing argument. We see no reversable error in the prosecutor's argument.

The judge, shortly after the jury retired, entered the jury room and, after each attorney expressed "no objection," told the jury, in response to the jury's request, that there was no transcript and that even if there had been it could not be given to the jury which had to rely upon its recollection of the evidence. Three months after the trial this court granted Medansky's motion for remand for a hearing limited to making a record for appeal regarding the district judge's action. The record of the hearing, with testimony taken from the judge and jurors, shows that while the judge was with the jury, a juror spoke up in response to the judge's statement that there was no transcript and asked what counsel was reading from when they were trying to impeach witnesses. The judge told the jury that what counsel were using were transcripts from the first trial and should not concern the jury in their deliberations.

Even though the incident did not seriously concern Medansky until three months after his conviction, a hearing was held, to develop all the pertinent facts and circumstances. We are not persuaded that the district judge's

conduct was prejudicial to Medansky so as to deprive him of his Sixth Amendment right to a jury trial or to violate Rule 43 in the light of the harmless error rule. 52(a) F.R. Cr.P. *See United States* v. *Arriagada,* 451 F.2d 487, 488 (4th Cir. 1971), citing Judge L. Hand in *United States* v. *Compagna,* 146 F.2d 524, 528 (2nd Cir. 1944), *cert. denied,* 324 U.S. 867.

For the reasons given, the judgment of conviction is AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.